

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRY LYNN TREVINO,

Defendant-Appellant.

UNPUBLISHED

April 20, 2004

No. 245324

Lenawee Circuit Court

LC No. 02-009651-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRY LYNN TREVINO,

Defendant-Appellant.

No. 245451

Lenawee Circuit Court

LC No. 02-009799-FH

Before: Talbot, P.J., Neff and Donofrio, JJ.

PER CURIAM.

In Docket No. 245324, defendant appeals as of right his jury trial convictions of carrying a firearm with unlawful intent, MCL 750.226, discharging a firearm at a dwelling, MCL 750.234b, and possession of a firearm during the commission of a felony, MCL 750.227b, arising from a drive-by shooting. Defendant's girlfriend, Jessica DeLeon, drove the car while defendant and passenger Carlos Torres fired weapons out the passenger window. Defendant was sentenced to concurrent terms of twenty-nine to sixty months, and twenty-three to forty-eight months, and to a consecutive two-year term for felony-firearm. In Docket No. 245451, defendant appeals as of right his conviction by a jury of tampering with a witness, MCL 750.122, arising from letters he wrote to DeLeon, asking her to change her testimony. Defendant was sentenced to one to four years' imprisonment. These cases have been consolidated on appeal. We affirm.

Docket No. 245324

Defendant argues on appeal that the trial court abused its discretion by denying his motion for a new trial based upon prosecutorial misconduct where the prosecutor misled the jury regarding the consideration that DeLeon and Torres received for their testimony. We disagree.

We review a trial court's decision regarding a motion for new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). Because defendant did not raise this objection below, we review the underlying claim for plain error. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Under the plain error rule, reversal is only required when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Here, the prosecutor asked DeLeon and Torres about their plea agreements and they replied truthfully. DeLeon's later testimony on cross-examination was clearly confused, but she did indicate that the original charge against her had been reduced, that the police told her that they would talk to the prosecutor if she told the truth and it would go "easier" on her, and that she knew she had a sentencing date. Nothing in the record suggests that the prosecutor suppressed evidence regarding DeLeon's and Torres' plea agreements, and defendant acknowledges on appeal that the information was contained in the court file. There is nothing here to suggest that the prosecutor elicited false testimony. Defense counsel did not ask for disclosure of the plea agreements on the record, and there may have been strategic reasons for that decision. The trial court did not abuse its discretion in denying defendant's motion for new trial on this basis.

Docket No. 245451

Defendant also argues that the trial court abused its discretion by failing to vacate his conviction for tampering with a witness, and alleges that the trial court rejected his guilty plea to attempt because of a mistake of law. Defendant suggests that the trial court was not aware that either a promise of value or a threat can form the basis for a charge under MCL 750.122. There is no merit to this claim.

A trial court's decision to accept or reject a guilty plea is reviewed for an abuse of discretion. *People v Grove*, 455 Mich 439, 444; 566 NW2d 547 (1997). Here, at the plea hearing, the trial court asked defendant to give a factual basis for his plea. When defendant denied that he had made any threat to DeLeon, the trial court specifically asked defendant whether he had made any promises. Defendant replied that he had only promised that he and DeLeon would "be together." Contrary to defendant's subsequent claim, the trial court recognized that a promise of value could form the basis of defendant's plea, and rejected defendant's plea because he did not offer any indication that a promise of value had been made. Later, before the trial in this matter, defense counsel informed that court that the plea agreement was still available to defendant but that defendant had "changed his mind" and did not want to take advantage of it. Thus, any challenge defendant might have to the plea proceeding is moot, and we find no abuse of discretion.

Finally, defendant argues in both cases on appeal that his counsel¹ was constitutionally ineffective for failing to discover and elicit testimony regarding the true nature of DeLeon's and Torres' plea agreements, and for failing to inform the trial court of its mistake of law regarding the witness tampering statute.

To establish ineffective assistance of counsel, the defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). The defendant has the burden to show a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different, and that the proceedings were fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Decisions about calling, questioning, and cross-examining witnesses are matters of trial strategy which we will not second guess. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The fact that the strategy was not successful does not amount to ineffective assistance. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

In Docket No. 245324, defendant argues that it is "not at all clear" that his trial counsel's examination of witnesses was based on trial strategy, but we find that defendant's speculation does not overcome the presumption that counsel's decisions about witnesses were strategic. *Rockey, supra*, 237 Mich App 76. In Docket No. 245451, defendant invites this Court to presume that his counsel at the plea hearing would have given defendant different advice if counsel had understood the elements of the jury tampering charge, MCL 750.122. The record does not support defendant's presumption. The record of the plea hearing is replete with notations that the proceedings were "paused" so that defendant and counsel could confer, making it equally possible that defendant was hesitant to enter a plea. This possibility is bolstered by the trial court's specific recognition that the plea could be supported by either a promise or a threat, and by defendant's decision not to enter a plea even though the plea offer remained available to him until trial. Defendant has not overcome the presumption that counsel's actions were matters of trial strategy, that those actions were reasonable or that any alleged defects detrimentally affected the result of the trial. *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998).

Affirmed.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ Pat M. Donofrio

¹ Defendant's challenges involve two different attorneys, one at trial in the underlying case, and one at the plea hearing.